FOR ARGUMENT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

Nos. 74-1589 and 74-1590

GENERAL ELECTRIC COMPANY,
vs. *Petitioner,*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL., *Respondents.*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL., *Petitioners,*

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

SUPPLEMENTAL BRIEF AMICUS CURIAE ON BEHALF OF LIBERTY MUTUAL INSURANCE COMPANY.

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INTEREST OF THE AMICUS CURIAE[1]

Liberty Mutual Insurance Company (hereafter "Liberty") was the petitioner in a case originally argued in tandem with the instant case, *Liberty Mutual Insurance Company* v. *Sandra Wetzel, et al.* (hereafter "*Liberty Mutual*"), No. 74-1245, which was remanded by this Court and is now pending in the Court of Appeals for the Third Circuit. See ..... U. S. ....., 96 S. Ct. 1202.[2] As the parties herein represented to this Court, "the same question" is presented in both cases.[3] Liberty filed, and this Court accepted, a brief *amicus curiae* prior to the original argument in the instant case. Liberty seeks herein only to supplement its brief *amicus curiae*, specifically addressing the applicability of *Washington, et al.* v. *Davis*, ... U. S. ....., 96 S. Ct. 2040 (June 7, 1976) which was issued after the original oral argument in the instant case. Liberty's full position is set forth in both its original brief *amicus curiae* and its briefs filed with this Court in *Liberty Mutual*, Case No. 74-1245, and will not be duplicated herein.

ARGUMENT

In its previous briefs Liberty demonstrated that in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), this Court resolved the threshold question presented herein, *i.e.*, that a pregnancy exclusion in an employer's disability income plan does not, standing alone, constitute discrimination based on gender *per se*. See

1. This brief is filed with the consent of all parties in accordance with Rule 42(2) of this Court.

2. On March 23, 1976, this Court vacated the judgment of the Third Circuit for want of an appealable order and instructed the Court of Appeals to dismiss the appeal. On April 30, 1976, the appeal was dismissed by the Court of Appeals. On August 24, 1976, in response to a motion by plaintiff Wetzel the District Court issued a prospective injunction from which Liberty has appealed to the Third Circuit where the case is now pending.

3. Joint Petition of All Parties for a Writ of Certiorari, p. 7.

Liberty's principal brief in *Liberty Mutual*, pp. 7-15, and Liberty's brief *amicus curiae*, pp. 6-7. Liberty acknowledged, however, that even if such a pregnancy exclusion does not automatically constitute unlawful discrimination within the meaning of Title VII,[4] it may still be necessary to evaluate individual insurance programs to determine whether any particular program is structured to disfavor one gender or another class protected by Title VII. Hence Liberty also proposed the appropriate standard against which any employer's income insurance policy could and should be measured under Title VII. See Liberty's principal brief in *Liberty Mutual*, pp. 21-24, and Liberty's brief *amicus curiae*, pp. 6-7. The decision issued by this Court in *Washington* v. *Davis, supra*, does not in any way modify the aforementioned threshold conclusion that this Court in *Geduldig* rejected Respondent Gilbert's position that the exclusion of pregnancy-related disabilities from insurance coverage can, without additional evidence, establish a discriminatory employment practice within the meaning of Title VII. That threshold conclusion and the standard proposed by Liberty to be used to evaluate the multitude of employers' insurance policies remain valid and are correct.

1. Albeit *Washington* v. *Davis, supra*, and *Geduldig* v. *Aiello, supra*, both arose from allegations that certain conduct violated constitutional due process and equal protection standards, the issues presented to and resolved by this Court in those two cases were markedly different. In *Washington* this Court confronted the validity of a written personnel test which had " 'a highly discriminatory impact in screening out black candidates' " (96 S. Ct. 2045, citing *Davis* v. *Washington*, 348 F. Supp. 15, 16 (D. C. 1972)) applying for police jobs with the District of Columbia Police Department. The question resolved by this Court in *Washington* was not whether discrimination *per se* existed, but whether this apparently neutral "barrier to employment" (*Griggs* v. *Duke Power Co.*, 401

4. Section 703 of Title VII of the Civil Rights Act of 1964, as amended (42 U. S. C. § 2000e, *et seq.*).

U. S. 424, 431 (1971)) was permissible under the Due Process Clause. In the absence of "a discriminatory purpose" underlying the use of the test, this Court held that the test, with its discriminatory impact, was permissible. The District of Columbia was not required to provide a "justification [for discrimination] . . . beyond what would be necessary to justify most other legislative classifications." *Washington* v. *Davis, supra,* 96 S. Ct. at 2050. *Geduldig,* by contrast, presented a basic question, not at issue in *Washington,* which, as stated by Judge Widener below, was "whether the exclusion of pregnancy-related disability from the disability benefits plan is sex discrimination." *Gilbert* v. *General Electric Company,* 519 F. 2d 661, 668. If it is not sex discrimination, it is immaterial whether the plan is measured against Title VII or a constitutional standard; there would be no violation of either standard. Hence, the presentation set forth by Liberty in its prior briefs, referred to above, and by General Electric in its principal brief (pp. 26-34), demonstrating that the exclusion of pregnancy from the risks insured under an employer's benefit program does constitute discrimination based on gender *per se,* is unaffected by *Washington* v. *Davis, supra.* Succinctly, as this Court recognized in *Geduldig,* there is no "identity between the excluded disability [pregnancy] and gender as such. . . ." 417 U. S. at 496-497 n. 20.

2. Notwithstanding *Washington* v. *Davis, supra,* the significant question confronting this Court is still what analytical framework should be utilized to evaluate the multitude of differing employer insurance programs under Title VII. As Liberty has already explained, where, as here, all employees are insured for all the included and covered risks without regard to gender, the appropriate analysis requires that the employer's entire insurance plan be considered. See Liberty brief *amicus curiae,* pp. 6-7. An evaluation limited to a single risk exclusion within an insurance policy, as sought by plaintiff Gilbert, "is of minimal value in assessing the neutrality" (*Washington* v. *Davis,* 96 S. Ct. at 2055 (Stevens J., concurring)) of the

employer's policy, *i.e.,* the equality of the benefits and compensation offered to employees of both genders. Such a limited perspective, if used, would reach too far and invalidate the exclusion of almost every medical risk except those few that affect males and females identically. Accordingly, it is necessary that a meritorious attack upon the "underinclusiveness of the set of risks" (*Geduldig* v. *Aiello,* 417 U. S. at 494) for which protection is offered, must, unlike here, be founded upon "evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable [protected] group or class in terms of the aggregate risk protection. . . ." *Geduldig* v. *Aiello,* 417 U. S. at 496-497. The record, however, clearly establishes that General Electric provides at least proportional benefits on an aggregate basis to its female employees. See Liberty brief *amicus curiae,* pp 7-9. Plaintiffs have not demonstrated, as it is submitted they must, that General Electric inequitably distributed either insurance premiums or benefit dollars, or that the pregnancy disability exclusion was pretextual or skewed in favor of males. The "plain fact of the matter is that [General Electric's plan] does not discriminate against [female employees]." *Espinoza* v. *Farah Manufacturing Company,* 414 U. S. 86, 92-3 (1973). To conclude otherwise would not insure equality—the only objective of Title VII—but would require instead that a greater economic benefit be provided. The propriety of such preferential or compensatory treatment is a political question for Congress.

CONCLUSION

For the reasons set forth above, in Liberty's principal brief *amicus curiae*, and in Liberty's briefs in *Liberty Mutual*, Case No. 74-1245, as well as those presented by General Electric, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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